No. 22,302

United States Court of Appeals

For the Ninth Circuit

LOIS COCHRAN,

Appellant,

vs.

MARIO DELIZIO,

Appellee.

Appeal from the United States District Court
for the District of Nevada

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an action which originated in the Nevada State Courts by the filing of the Complaint (Tr. of Rec. 187-189) in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe and which was transferred by Petition for Removal (Tr. of Rec. 184-186) to the United States District Court for the District of Nevada in Reno, Nevada, pursuant to 28 U.S.C., Sec. 1332, and 28 U.S.C., Sec. 1441, on behalf of Defendant Mario Delizio, on the basis of diversity of citizenship, and

that the matter in controversy exceeded the sum of $10,000.00. The U.S. District Court had jurisdiction by reason of Plaintiff's citizenship in the State of Nevada and the citizenship of Defendant Mario Delizio in the State of California. A jury was demanded by Defendant.

The appeal is taken by the Plaintiff as a matter of right under the provisions of 28 U.S.C., Sec. 1291, being an appeal from a final decision of a Federal District Court.

STATEMENT OF THE CASE

This is an action for personal injuries suffered by Plaintiff Lois Cochran arising from an automobile collision which occurred in the City of Reno, State of Nevada, at approximately 3:30 to 4:00 p.m. (T 176) on September 25, 1965, at the intersection of West Street and West Fifth Street (T 8). Plaintiff was a passenger in the right front seat of a 1964 Plymouth Fury automobile operated by her husband Francis Cochran. (T 118-119.)

The Plaintiff finished working that day at 3:15 p.m. at Washoe Medical Center (T 175), drove three miles to her home, changed clothes, then entered the vehicle driven by her husband and they were on their way to Sparks, Nevada to attend a wedding reception already in progress when the accident occurred (T 176). Plaintiff sustained superficial injuries to her right hip, shoulder, neck, right arm and right leg. (T 123.)

The Defendant Mario Delizio was operating a 1953 Ford automobile. (T 58.) There were four passengers in his car, Mrs. Helen Furry, seated in the middle front seat (T 109), Mrs. Ada Schaefer, seated in the right front seat (T 306), Mr. Leon Furry, seated in the left rear seat (T 196), and Adolf Deering, seated in the right rear seat (T 196). The Defendant's destination was his home in Greenville, California. (T 77-78.)

The Plaintiff's 1964 Plymouth Fury was travelling in the outer lane of Fifth Street in an easterly direction. (T 119.) Fifth Street was a four-lane, through street, with two lanes for eastbound traffic and two lanes for westbound traffic, measuring a total of approximately 56 feet wide. (T 10.) The two eastbound lanes were approximately 27 feet wide. (T 13.) West Street, a north-south intersecting street, was approximately 55 feet wide. (T 13.) The Defendant was travelling north on West Street. Fifth Street on the east side of its intersection with West Street is offset approximately 19 feet to the south. (T 11.) This offset requires an eastbound driver on Fifth Street to turn to the right at West Street sufficiently to move 19 feet to the right as he traverses the intersection in order to maintain the same position in the outside or right-hand lane of traffic on Fifth Street. (T 287.) There was a stop sign on West Street, the street on which Defendant Delizio was travelling, as it intersected with Fifth Street. (T 14.)

It was a clear day, the streets were dry, and visibility was good. (Exhibit 16-A.) There were no ob-

structions on the southwest corner of the intersection and the view of each driver was equally clear. (T 24-25, 56, 91-92, 281, 284.)

The Defendant Delizio came to a complete, dead stop before reaching the crosswalk on the south side of Fifth Street on West Street. (T 83, 86.) This fact was confirmed by the observations and direct testimony of the passengers in his vehicle, Leon Furry (T 197), Helen Furry (T 209-210), and Ada Schaefer (T 30, 307, 308). Mr. Delizio looked to his left and to his right before he proceeded into the intersection. (T 84-85.) This was confirmed by the observation and direct testimony of the passenger Helen Furry. (T 210.) He could see a good one-half block to his right and there was no traffic coming. (T 86.) He could see a good half block to his left while stopped and there was no traffic coming. (T 86, 90.) After being assured that the road was completely clear, the Defendant proceeded slowly into the intersection in second gear. (T 86, 111-112.) The fact that he was proceeding slowly into the intersection was confirmed by the observation and direct testimony of the passenger Helen Furry (T 223) and the passenger Ada Schaefer (T 322). The Defendant was travelling between 5 and 10 mph at the time of the impact and reached a maximum of 10 mph prior to impact. (T 90, 113.) This is corroborated by the testimony of the passengers that the Delizio automobile was travelling slowly from the complete stop when the accident occurred. (Leon Furry (T 199); Helen Furry (T 220, 222); Ada Schaefer (T 322).)

The Defendant Delizio had proceeded, from the point where he had stopped, approximately 10 feet through the crosswalk (T 41) and 25 feet further to the point of impact (T 15-16, and Exhibits 16 and 16-A). Thus, the Defendant Delizio had proceeded a total distance of approximately 35 feet from the point at which he had stopped for the stop sign to the point of impact.

The Defendant having travelled from a speed of 0 to a maximum of 10 mph at the point of impact, a reasonable inference is that his average speed during the distance travelled of 35 feet was 5 miles per hour. The vehicle in which the Plaintiff was riding was reported to have been travelling at 25 mph at the point of impact. (T 51-52, 59, and Exhibit 16-A.) Thus, the Cochran vehicle was travelling five times as fast as the average speed at which the Defendant Delizio's automobile was travelling. Accordingly, while the Defendant Delizio was travelling a distance of 35 feet, the Cochran vehicle, inferentially, travelled approximately five times that far, or a total of 175 feet. Under these circumstances, the Cochran vehicle was in excess of one-half block to the west of the point of impact when the Defendant Delizio looked at the road to his left, saw no traffic within one-half block, and then proceeded into the intersection.

The driver of the Cochran vehicle, Francis Cochran, testified that the intersection was known to him to be one which required "watching where you were going", but that he "wasn't noticing" and "a car just hit me right on the side." (T 278 and 284.) During the

entire block approaching the intersection he was aware that he was approaching a cross street (T 279) and that there might be cars proceeding north across that intersection (T 280). He testified that he did not look for northbound traffic as he approached the intersection and did not see Mr. Delizio's automobile until they were both in the intersection (T 285, 286), even though he could see cars stopped at that intersection on West Street facing north. (T 281, 284, second page so numbered.)

Although the driver of the Cochran vehicle was not distracted (T 295), there were no physical obstructions to his vision (T 295), and there were no defects in his windshield (T 296), he did not see the Defendant's vehicle prior to impact (Exhibit 16-A, T 52-54, 150, 278). This fact is corroborated by the fact that there were no skid marks left by the Cochran vehicle prior to impact. (T 20, 41-42.) There was no physical evidence or visible evidence of any kind to suggest that the driver of the Cochran vehicle applied his brakes, attempted to slow down or stop the vehicle, or change the direction of its travel prior to impact. (T 41-42.) In spite of the fact that the driver of the Cochran vehicle did not see the Delizio vehicle prior to impact (T 71), he accused the Defendant Delizio of failing to stop at the stop sign which was immediately denied by both the Defendant Delizio (T 115-116, 203) and the witness Ada Schaefer (T 310).

The driver of the Cochran vehicle also testified that as he entered the intersection of Fifth Street and West Street, he intended to turn to the right in order

to travel 19 feet south as he travelled through the intersection in order to stay in the outside lane of Fifth Street. (T 287.) In fact, he did turn to the right on the day of the accidently directly into the path of the Defendant Delizio's vehicle. (T 289, 290.)

The Plaintiff riding in the front seat of the Cochran vehicle did not see the Defendant Delizio's vehicle until the Cochran vehicle was two-thirds of the distance through the intersection. (T 144.)

At impact, the Delizio automobile did not proceed forward any distance but was pulled to the right by the force of the Cochran vehicle a total of 7 feet 5 inches. (T 16, 40, 201.) The Cochran vehicle proceeded on past the point of impact a total of almost 47 feet, almost seven times the distance travelled by the Defendant's vehicle. (T 40-41, Exhibit 16-A.)

The evidence established that the Cochran vehicle was exceeding the speed limit of 25 miles per hour. The Defendant Delizio testified that the Cochran vehicle was going "pretty fast, 60 is the number or better. It was pretty fast." This was corroborated by Helen Furry (T 211), and Ada Schaefer (T 309). Any speed in excess of 25 mph would necessarily mean that the Cochran vehicle was in excess of 175 feet from the point of impact when the Defendant Delizio first proceeded into the intersection. The Defendant Delizio saw the Cochran vehicle when it was approximately 10 feet away (Exhibit 16-A, T 51), and applied his brakes and tried to stop, but it was too late (T 105, 331).

The Plaintiff, Lois Cochran, testified that the 1964 Plymouth Fury automobile involved in the accident was registered with the Department of Motor Vehicles of the State of Nevada showing the legal owners as "Francis or Lois Cochran" (T 169), that Francis Cochran was driving the vehicle with her consent (T 169), and that she and Francis Cochran were husband and wife and living in the same household (T 170). There was no evidence offered by the Plaintiff to rebut the legal presumption that the automobile was owned in joint tenancy by the Plaintiff and her husband, Francis Cochran, and that she could transfer the legal title to the automobile on her sole signature as the legal owner.

On Thursday, June 29, 1967, the case was thoroughly argued by counsel on behalf of the Plaintiff and the Defendant. (T 2A, 4-57.) The jury was fully instructed by the Court. (T 420-444.) The jury retired from the Courtroom at 2:20 p.m. and returned to the Courtroom at 3:25 p.m. with a verdict for the Defendant and against the Plaintiff. (T 445-448.)

Plaintiff made no motion for a new trial before the trial judge, the Honorable Pierson M. Hall, District Judge, presiding.

Appellee will answer the specifications of errors and argument of Appellant jointly in the order presented by Appellant and will then present Appellee's authorities in support of the Judgment appealed from.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT ANY NEGLIGENCE OF PLAINTIFF'S HUSBAND AS DRIVER OF THE CAR WAS IMPUTABLE TO PLAINTIFF.

The uncontradicted evidence established that the 1964 Plymouth Fury in which the Plaintiff was riding was being operated by her husband, Francis Cochran, with the permission of the Plaintiff, and that the records of the Motor Vehicle Department of the State of Nevada established that the registered and legal owners of the automobile were "Francis Cochran or Lois Cochran." The evidence therefore established without contradiction that this case was directly within the provisions of a Nevada statute in force at the time of the accident which required that the negligence of Francis Cochran be imputed to Lois Cochran as an owner of the 1964 Plymouth Fury. Nevada Revised Statutes Sec. 41.440 provided as follows:

> "Any liability imposed upon a wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family arising out of his or her driving and operating a motor vehicle upon a highway with the permission, express or implied, of such owner is hereby imposed upon the owner of the motor vehicle, and such owner shall be jointly and severally liable with his or her wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family for any damages proximately resulting from such negligence or wilful misconduct, *and such negligent or wilful misconduct shall be imputed to the owner of the motor vehicle for all purposes of civil damages.*" (Emphasis added.)

This statutory enactment by the Nevada State Legislature became effective July 1, 1957. It is not a judicial expression of a rule of law known as the "Family Purpose Doctrine." Accordingly, the cases relied upon by Appellant which refer to the judicially created "Family Purpose Doctrine" have no application in the consideration of this case.

In 1935, the State of California enacted a statute imposing liability on the owner of a motor vehicle for the negligence of a permissive driver in the following language:

> "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle, in the business of the owner or otherwise, by a person using or operating the same with the permission, express or implied, of the owner." (Vehicle Code, Section 402.)

In 1937, the statute was amended to add the following language:

> "*. . . and the negligence of such person shall be imputed to the owner for all purposes of civil damages.*" (Vehicle Code, Section 402; emphasis added.)

The California Supreme Court was called upon to interpret this amendment and decide whether or not the statute would impute the negligence of the operator to the owner so as to bar any recovery by the owner against a third person. The California Supreme Court unanimously held that the statute quoted above exprssly required the imputation of the negligence of the operator to the owner so as to bar re-

covery by the owner against the third party. *Milgate v. Wraith,* 19 Cal.2d 297, 121 P.2d 10 (1942). The California Supreme Court stated as follows:

> ". . . The phrase 'the negligence of such person shall be imputed to the owner for all purposes of civil damages' can be interpreted in no other sense than to include actions by the owner against third persons. Indeed that was undoubtedly the very purpose of the amendment." (121 P.2d at 11.)

The California Supreme Court further quoted from the trial court as follows:

> ". . . 'Its purpose, then, would seem to be that which its wording is sufficiently comprehensive to cover, namely, the imputation of such negligence in all cases where the rights and obligations of the owner are involved in civil actions for damages. Its only effect, which may also be considered its purpose, was to definitely extend the imputation to actions in which the owner sought redress in damages.' " (121 P.2d at 11.)

It should be noted that the language of the Nevada imputation statute is almost precisely identical with the language of the California imputation statute referred to in the California Supreme Court decision.

The California Supreme Court decision in *Milgate v. Wraith, supra,* has been followed in numerous cases, including *Dorsey v. Barba,* 38 Cal.2d 350, 240 P.2d 604 (1952); *Birnbaum v. Blunt,* 152 C.A.2d 371, 313 P.2d 86 (1957); *Rody v. Winn,* 162 C.A.2d 35,

327 P.2d 579 (1958); *Lambert v. Southern Counties Gas Co.,* 340 P.2d 608 (Calif. 1959); *Zabunoff v. Walker,* 192 C.A.2d 8, 13 Cal. Rptr. 463 (1961).

In *Mooren v. King,* 182 C.A.2d 546, 6 Cal. Rptr. 362 (1960), the Appellate Court affirmed a judgment against the wife based upon the imputation of the negligence of the husband to the Plaintiff wife and stated as follows:

> ". . . moreover, in the case at bar the automobile operated by Mr. Mooren was owned jointly by him and his wife. There is no showing that it was community property. These circumstances would foreclose recovery by the wife in the event her husband was contributively negligent, independent of their husband and wife relationship. Under Section 17150 of the Vehicle Code, formerly Section 402, the negligence of the operator of an automobile is imputed to the owner thereof for all purposes of civil damages. *Milgate v. Wraith,* 19 Cal.2d 297, 299, 121 P.2d 10; *Spendlove v. Pacific Electric Ry. Co.,* 30 Cal.2d 632, 634, 184 P.2d 873."

The evidence in the trial of this action established without dispute that the automobile was owned by the Plaintiff and her husband as joint tenants. In this regard, the legal ownership as registered with the Department of Motor Vehicles determines the ownership of the vehicle. See Nevada Revised Statutes Section 482.400 which provides in part as follows:

> "1. . . . upon a transfer of the title or interest of a legal owner or owner in or to a vehicle reg-

istered under the provisions of this chapter, the person or persons whose title or interest is to be transferred and the transferee shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, together with the residence address of the transferee, in the appropriate spaces provided upon the reverse side of the certificate.

2. Immediately thereafter the transferee shall apply for registration as provided in N.R.S. 482.-215, . . ."

Nevada Revised Statutes Section 482.410 provides as follows:

"Upon receipt from the transferee of the certificate of ownership properly endorsed, the certificate of registration of the vehicle, the application, the privilege tax and the registration fee the department shall register such vehicle as provided in this chapter with reference to an original registration, and shall issue to the owner and legal owner entitled thereto, by reason of such transfer, a new certificate of registration, a new license plate or plates, and a new certificate of ownership, respectively, in the manner and form provided in this chapter for original registration."

Thus, the ownership certificate issued by the Department of Motor Vehicles of the State of Nevada is *the* indicia of title and is not merely evidence of the ownership of the vehicle. Here, the Plaintiff, Lois Cochran, with her sole signature could transfer the absolute ownership of the vehicle without the signa-

ture of her husband, Francis Cochran. This establishes conclusively that she was an *owner* of the vehicle within the express language of Nevada Revised Statutes Section 41.440 requiring the imputation to her of the negligence of her husband, a permissive driver, *for all purposes of civil damages.*

Appellant, at pages 28-29 of the Opening Brief, asserts that the Nevada law is clear that Lois Cochran's cause of action for personal injuries was her separate property and that her husband's negligence is not imputable to her regardless of the form of ownership of the automobile. In a grand *non sequitur* the Appellant then concludes that "N.R.S. 41.440 clearly is inapplicable and has nothing to do with the situation presented herein, as is evidenced by the Nevada authorities cited above." It is Appellee's contention that not one of the cases cited by Appellant supports this conclusion.

In the first place, the character of the Plaintiff's recovery, i.e., separate or community property, was never an issue in this case and the cases dealing with this problem are irrelevant. Thus, *F. & W. Construction Co. v. Boyd,* 60 Nev. 117, 102 P.2d 627 (1940) merely held that the negligence of the husband could not be imputed to the wife solely by reason of the character of the wife's recovery of damages. In other words, the court held that the damages recovered by the wife would be her separate property rather than her community property and that the husband's negligence would not be imputed on the basis that he would share in the proceeds.

Secondly, the *case law* in the State of Nevada concerning the imputation of negligence prior to the enactment of N.R.S. 41.440 has no application to an action falling within the provisions of the *statute,* N.R.S. 41.440.

Appellant makes reference to *Lee v. Baker,* 77 Nev. 462, 366 P.2d 513 (1961). The accident which gave rise to this case occurred on May 9, 1957. The Nevada statute, N.R.S. 41.440, became effective July 1, 1957. Accordingly, the statute was not alleged in the Defendant's Answer and there was no issue concerning the ownership of the vehicle or the imputation of negligence of the driver to the owner under the statute which became effective after the accident occurred. For these reasons, this opinion of the Nevada Supreme Court cannot be considered authority of any kind concerning the legal effect of the statute in question.

Likewise, in *Cook v. Faria,* 74 Nev. 262, 328 P.2d 568 (1958) the accident which gave rise to the suit occurred on October 30, 1953, almost four years prior to the enactment of the statute. The opinion cited by Appellant at 74 Nev. 262, 328 P.2d 568 (1958) clearly discloses that the case was previously before the Nevada Supreme Court. The citation of the prior appellate decision is given as 73 Nev. 295, 318 P.2d 649 (1957). The prior opinion shows that the accident occurred on October 30, 1953. Appellant not only fails to disclose this fact to this Appellate Court, but attempts to argue by innuendo that the Nevada Supreme Court in its opinion of August 11, 1958, by

implication *holds* that N.R.S. 41.440 does not require imputation of negligence to the owner-wife.

In *Morrissett v. Morrissett,* 80 Nev. 566, 397 P.2d 184 (1964), the Nevada Supreme Court held that the inter-spousal immunity at common law is likewise in force in the State of Nevada. The reference by Justice Thompson to the imputation of negligence occurred in a *dissenting* opinion and related only to the separate porperty character of the wife's recovery.

King v. Yancey, 147 F.2d 379 (9th Cir. 1945) was decided before the enactment of N.R.S. 41.440 and was based upon the Nevada case law concerning the separate property character of the wife's recovery.

Likewise, the statement in the annotation at 35 A.L.R.2d 1199, 1231, concerns the character of the spouse's recovery and refers to the Nevada case law prior to the enactment of the statute.

Finally, Appellee can affirmatively demonstrate that the Nevada Supreme Court has not ruled on the imputation of negligence under N.R.S. 41.440 by quoting the following language from an opinion of the Nevada Supreme Court in *Wilson v. Perkins,* 82 Nev. 42, 409 P.2d 976 (1966):

> "Since we uphold the jury's determination that there was no contributory negligence that proximately led to the accident, we need not decide appellant's second specification of error concerning imputation of negligence to the wife as an owner of the vehicle under N.R.S. 41.440." (409 P.2d at 977)

The decisions cited by Appellant from jurisdictions other than Nevada and California deal with cases in-

volving either no statute at all or statutes dissimilar to the California and Nevada enactments. Accordingly, these cases provide no support whatever to Appellant's position.

In *Bartek v. Glasers Provisions Co.,* 160 Neb. 794, 71 N.W.2d 466 (1955) there was no statute whatever and the court was dealing with the family purpose *doctrine.* Accordingly, the case has no application here.

Likewise, *Brower v. Stolz,* 121 N.W.2d 624 (N. Dak. 1963) and *Michaelsohn v. Smith,* 113 N.W.2d 571 (N. Dak. 1962) both involved the family purpose *doctrine* and did not interpret a statute.

Neither the Iowa statute involved in *McMartin v. Saemisch,* 116 N.W.2d 491 (Iowa 1962) nor the Minnesota statute involved in *Christensen v. Hennepin Transp. Co.,* 215 Minn. 394, 10 N.W.2d 406 (1943) contained any language similar to the Nevada statute, N.R.S. 41.440, or the California statute, Vehicle Code, Section 402, subsequently changed to Section 17150. Accordingly, the *McMartin* case and the *Christensen* case are not authority of any kind for Appellant's contention that the Nevada statute does not require imputation of contributory negligence to the owner.

Jacobsen v. Dailey, 36 N.W.2d 711 (Minn. 1949) merely follows the *Christensen* case, *supra,* and does not involve a statute similar to the Nevada or California statute.

In *Universal Underwriters Insurance Co. v. Hoxie,* 375 Mich. 102, 133 N.W.2d 167 (1965), the court was concerned with a statute which has no language re-

motely similar to that contained in the Nevada statute and the California statute quoted hereinabove.

Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540 (Minn. 1966) did not involve any statute whatever.

Jasper v. Freitag, 145 N.W.2d 879 (N. Dak. 1966) did not involve any statute whatever.

Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (1941) merely held that the language of the New York statute did not contain any language which would require the extension of the statutory imputation of liability to include the contributory negligence of the driver to the owner.

New York Telephone Co. v. Scofield, 31 N.Y.S.2d 393 (1941) and *Petro v. Eisenberg,* 207 Misc. 380, 138 N.Y.S.2d 705 (1955) merely followed the *Jenks* case, *supra.*

The Court should note that the California statute requiring imputation of negligence to the owner for all purposes of civil damages was enacted in 1937. The Nevada State Legislature must be deemed to have been aware of this statutory provision of its neighboring state when it enacted N.R.S 41.440 twenty years later in 1957. Likewise, the Nevada Legislature should be deemed to have been aware of the California decisions such as *Milgate v. Wraith, supra,* when it expressly provided that the negligent or wilful misconduct of the driver "*shall* be imputed to the owner of the motor vehicle for *all* purposes of civil damages." (Emphasis added.) Appellee respectfully suggests that this Court should not ignore or judicially

repeal the obvious intention of the Nevada State Legislature expressed in the clear language of this statute.

In view of the uncontradicted evidence before the trial court and the clear language of the statute, the trial court did not err in instructing the jury that any negligence of the Plaintiff's husband as permissive driver of the car was imputable to the Plaintiff.

II. THE COURT'S INSTRUCTIONS ON THE DEFINITION AND SUBJECT OF CONTRIBUTORY NEGLIGENCE WERE NOT PREJUDICIAL ERROR.

A. Appellant Did Not Object to the Court's Proposed Instruction Defining Contributory Negligence As Required by F.R.C.P. 51.

During the settling of instructions, the trial court advised counsel as follows:

> "So I will give 73.18 of Mathes, 73.21 and 73.23.
>
> Mr. Richards Wait: Your Honor, at what stage under your procedure are we expected to make formal exceptions?
>
> The Court: *Right now* as we go along, as I pass each instruction.
>
> Mr. Richard Wait: Because, you see, I don't have the Mathes book and I have assumed that I should examine this and make a record of it at the end.
>
> The Court: You can come down here early in the morning and take a look at it.
>
> Mr. Richard Wait: *I would be glad to do that.*"
>
> (T 385) (Emphasis added).

The Court was making reference to a well-known and well-recognized and respected work by the Honorable William C. Mathes, Chief Judge, United States District Court for the Southern District of California and the Honorable Edward J. Devitt, Chief Judge, United States District Court for the District of Minnesota, entitled *Federal Jury Practice and Instructions, Civil and Criminal,* (1965 Ed.).

Instruction No. 73.21 from *Mathes and Devitt* as amended by the Court is in its entirety as follows:

> "In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff herself, or the driver of the car in which she was riding, was the proximate cause of any injuries and consequent damage which the plaintiff may have sustained. Contributory negligence is fault on the part of a person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.
>
> By the defense of contributory negligence, the defendant in effect alleges that even though the defendant may have been guilty of some negligent act or omission which was one of the proximate causes, the plaintiff herself or her husband by her failure or his failure to use ordinary care—and that term will be defined to you in a moment—under the circumstances for her own safety at the time and place in question also contributed as one of the proximate causes of any injuries and damages the plaintiff may have suffered.

> The burden is on a defendant alleging the defense of contributory negligence to establish by a preponderance of the evidence in the case the claim that the plaintiff herself or the driver of the car, her husband, was also at fault and that such fault contributed one of the proximate causes of any injuries and consequent damages plaintiff may have sustained." (T 423-424.)

This is the instruction in its entirety as revised by the Court and to which counsel for Plaintiff objected as follows:

> "Finally at 73.21 we submit to the court that this is erroneous.
>
> The Court: Which one?
>
> Mr. Richard Wait: The definition of contributory negligence. 73.21. It reads as follows: 'In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, *that some contributory negligence on the part of plaintiff,*' and in this case the court has indicated a modification to read 'the driver'.
>
> The Court: *Some contributory negligence* on the part of the driver of the Cochran automobile?
>
> Mr. Richard Wait: Yes.
>
> Now, Your Honor, that isn't the law. There isn't any case that supports the giving of that instruction, *that there is some contributory negligence.*
>
> The Court: Doesn't it go on there and say that contributory negligence has to be contributed as one of the proximate causes?
>
> Mr. Richard Wait: Yes.

The Court: All right then, that clears it.

Mr. Richard Wait: And we have no instruction that says just some negligence is enough for the plaintiff to recover from the defendant.

The Court: The rest of the instruction clears the matter up. The contributory negligence has to be part of the negligence that contributes to the proximate cause of the accident. Isn't that what it says?

Mr. Richard Wait: *All we need do in this instruction is to eliminate the word some.* The word some is erroneous and we submit it is argumentative and prejudicial to the plaintiff.

The Court: Is that all?

Mr. Richard Wait: Yes, Your Honor." (T 415-416; emphasis added.)

It is obvious from the objection of counsel for Plaintiff that his *sole* objection was to the words "some contributory negligence on the part of the Plaintiff." There was no objection by Plaintiff in any form to that portion of instruction No. 73.21 which reads in part as follows:

"Contributory negligence is fault on the part of the person injured, in this case the plaintiff or the driver of the car, which cooperates in some degree with the negligence of another, and so helps to bring about the injury."

In spite of the fact that counsel for the Plaintiff made no objection whatever to the above quoted portion of the instruction concerning contributory negligence, Appellant has devoted one entire subsection of the Opening Brief to an argument to the Court that

this portion of the instruction was prejudically erroneous. (Appellant's Opening Brief IIA, pages 32-35.)

Federal Rules of Civil Procedure 51 provides as follows:

> "Instructions to Jury: Objection.
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating *distinctly* the *matter* to which he objects and the *grounds* of his objection." (Emphasis added.)

The law is clear that F.R.C.P. 51 requires a clear and distinct objection to the particular matter objected to in the proposed instructions of the Court and a statement of the grounds of the objection. The reason for the rule is given in 5 *Moore's Federal Practice,* Sec. 51.04, at page 2505 as follows:

> "The rule does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, *as long as it is clear that the trial judge understood the party's position; the purpose of the rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them.*" (Emphasis added.)

In support of this statement, Moore cites the following cases: *Sweeney v. United Feature Syndicate, Inc.,* 129 F.2d 904 (C.C.A.2d, 1942); *Evansville Container Corp. v. McDonald,* 132 F.2d 80 (C.C.A. 6th, 1942); *Williams v. Powers,* 135 F.2d 153 (C.C.A. 6th, 1943); *Alcaro v. Jean Jordeau, Inc.,* 138 F.2d 767 (C.C.A. 3d, 1943); *Swiderski v. Moodenbaugh,* 143 F.2d 212 (C.C.A. 9th, 1944).

With reference to a general objection, 5 *Moore's Federal Practice,* Sec. 5104, page 2505 states as follows:

> "By the same token, a mere general objection is insufficient 'where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge is correct.'" (Citing *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 86 L.Ed. 645 (1943).)

The same work also states as follows:

> "Failure to particularize grounds of objection to instruction to jury so as to give the trial court an opportunity of correcting instruction if erroneous and to advise opposing counsel *precludes review on appeal.*" (5 *Moore's Federal Practice,* Sec. 51.04, page 2505; emphasis added.)

As authority, Moore cites the following cases: *Jack v. Craighead Rice Milling Co.,* 167 F.2d 96 (C.C.A. 8th, 1948) cert. den. 334 U.S. 829, 68 S.Ct. 1340, 92 L.Ed. 1756 (1948); *Hanson v. St. Joseph Fuel Oil and Manufacturing Co.,* 181 F.2d 880 (C.A. 8th, 1950); *Fritz v. Pennsylvania R. Co.,* 185 F.2d 31 (C.A. 7th,

1950); *Hoag v. City of Detroit,* 185 F.2d 764 (C.A. 6th, 1950); *Garland v. Lane-Wells Co.,* 185 F.2d 857 (C.A. 5th, 1951); *Biggans v. Hajoca Corp.,* 185 F.2d 982 (C.A. 3d, 1950).

Subparagraph B of Paragraph II of Appellant's Opening Brief, pages 36-39, is likewise devoted to an argument concerning a portion of the Court's instruction to which no objection was made. In other words, this portion of the Brief is likewise referring to that portion of the instruction from *Mathes and Devitt,* 73.21, which contains the language "cooperates in some degree" and "helps to bring about the injury." Counsel for Plaintiff did not advise the Court that objection was made to this portion of the instruction. Accordingly, the Court had no opportunity to correct the language objected to. For this reason, Appellant is not now in a position to urge to this Court that this portion of the instruction was erroneous.

Appellee does not agree that the instruction No. 73.21 from *Mathes and Devitt* as modified by the Court was prejudicially erroneous or erroneous at all. It is obvious that Appellant has attempted to pick to pieces and quote out of context one small portion of the complete instruction given by the Court. A review of the entire instruction shows that the jury was clearly advised that the contributory negligence in question must have contributed as one of the proximate causes of any injuries and damages the Plaintiff may have sustained. Thus, the instruction as a whole was perfectly proper and not erroneous in any respect. See *Freeman v. Churchill,* 30 Cal.2d 453, 183 P.2d 4

(1947); *Polk v. Los Angeles,* 26 Cal.2d 519, 159 P.2d 931 (1945); *Warren v. P.I.E. Co.,* 183 C.A.2d 155, 6 Cal. Rptr. 824 (1960); *Koch v. Denver,* 24 Colo. App. 406, 133 Pac. 1119 (1913).

Subparagraph C of Paragraph II of Appellant's Brief at pages 39-41 asserts that the reference in Defendant's argument to "one percent of the proximate causes" on the part of Mr. Cochran was prejudicial misconduct and reversible error. A close scrutiny of the transcript Volume 2A, page 44, line 15 to page 47, line 2, shows that the only objection made to Defendant's argument was that the word "proximate" had been omitted. When this oversight was pointed out to counsel for Defendant by the Court, counsel for Defendant wrote in the word "proximate" and thereafter made reference to "proximate cause". Thereafter, there was no objection to the following statement by counsel for Defendant:

> "If one percent of the causes, of the *proximate causes,* of this accident are the negligence of Mr. Cochran you may not award damages to the Plaintiff." (T 46; emphasis added.)

There being no objection to this statement, Plaintiff is not now in a position to assert that this argument was prejudicial misconduct and reversible error.

Appellee does not agree that this argument was misconduct of any kind, nor does Appellee agree that this argument was error of any kind. The cases cited by Appellant in support of this argument all involve erroneous *instructions* by the trial court to the trial jury. No authority whatever is cited for the propo-

sition that this argument by counsel would be error, prejudicial or otherwise.

However, any possible error in the Court's instructions or in counsel's arguments must be considered harmless and must be disregarded for the reason that the Plaintiff's substantial rights were not affected.

F.R.C.P. 61 provides as follows:

> "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The doctrine of presumed prejudice has been effectively eliminated by the several statutory enactments and court rules which have evolved into F.R.C.P. 61 in its present form. See 7 *Moore's Federal Practice,* Sections 61.01 and 61.02, pages 1001-1005.

Appellee respectfully submits that any error in the Court's instructions with respect to the subject of contributory negligence must be considered harmless error under Rule 61, inasmuch as any error or defect in the instructions in this regard did not affect the substantial rights of the plaintiff. As stated in *Moore:*

> "The doctrine of harmless error expressed in Rule 61 is applicable to errors in instructions to the jury, and whether such errors are harmless or prejudicial depends upon whether substantial rights of a party are affected thereby. If objections to the instructions are properly made, errors affecting substantial rights must be considered as grounds for reversal of the judgment on appeal." (7 *Moore's Federal Practice,* Section 61.09, page 1025.)
>
> "On the other hand, errors in instructions which do not affect substantial rights of a party must be disregarded and are not grounds for disturbing the verdict or judgment." (7 *Moore's Federal Practice,* Section 61.09, page 1026.)

A review of the record in the instant case clearly establishes that any minor, technical errors in portions of the Court's instructions concerning contributory negligence could not have in any way affected the substantial rights of the Plaintiff.

Likewise, any error in the argument of counsel for Defendant was immediately corrected by the trial court and accordingly could not possibly have affected the substantial rights of the Plaintiff. Accordingly, under Rule 61, the error, if any, should be disregarded as harmless.

III. THE TRIAL COURT'S INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE WERE NOT PREJUDICIALLY CUMULATIVE, UNBALANCED, REPETITIOUS OR GIVEN IN ERRONEOUS ORDER.

The instructions of the Court to which objection is made are set forth in the Appendix to Appellant's Opening Brief at pages ii, iii and iv. A careful analysis of these instructions shows that they can be summarized in order as follows:

1. The Defendant claims the defense of contributory negligence and the burden is upon the Defendant to prove such negligence was a proximate cause of the accident.

2. If any negligence of the driver Francis Cochran proximately contributed to the collision, it is deemed the negligence of the Plaintiff.

3. Proximate cause is defined.

4. No. 73.21 of *Mathes and Devitt, supra,* concerning contributory negligence including the claim of contributory negligence, the definition of contributory negligence, and the burden of proof on the Defendant.

5. No. 73.23 of *Mathes and Devitt, supra,* on the issues to be determined by the jury.

6. The burden of proof is defined.

7. The burden of proof is on the Plaintiff to prove the elements of her claim.

It is obvious that these instructions do not accentuate the duty of the Plaintiff and minimize the duty of the Defendant. Quite the contrary, these instructions accentuate the burden of proof on the Defend-

ant and the duty of the Defendant to establish the defense of contributory negligence. They minimize the duty of the Plaintiff to establish the elements of her claim.

Likewise, a close scrutiny of these instructions clearly demonstrates the incorrectness of the Appellant's claim that these instructions were prejudicially cumulative, unbalanced, repetitious and given in erroneous order. It is obvious that no "impossible heights" were reached, that there was no "terrible impact and effect upon Plaintiff's case" nor any "devastating impact and effect upon the jury". In this regard, Appellant's bald assertion that these instructions had a prejudicial influence and impact upon the jury can be answered with equal vehemence that the jury obviously heeded the admonition of the Court as follows:

> "If in these instructions any rule, direction or idea is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason you are not to single out any certain sentence, or any individual point or instruction and ignore the others; but you are to consider all the instructions as a whole, and to regard each in light of all the others.
>
> The order in which the instructions are given or the form in which they appear has no significance as to their relative importance." (T 421-422.)

Counsel for Appellant was advised by the Court in advance concerning the instructions which would be

given and the order in which they would be given. (T 385.) Likewise, counsel for Appellant was requested by the Court to state all objections and exceptions to the instructions as they were being discussed during the settlement of instructions. (T 385.) Counsel for Appellant did not object to the order of giving the instructions with the exception that counsel for Appellant objected to the order of giving the instruction on the duty of care of the rider. (T 388.) Counsel for Appellant does not advise this Court where objection was made to the order of the giving of the instructions concerning contributory negligence. Rather, counsel for Appellant attempts to excuse this oversight by claiming that the trial court did not make these instructions available to counsel for Plaintiff. This is clearly not true.

> "Mr. Richard Wait: Your Honor, at what stage under your procedure are we expected to make formal exceptions?
>
> The Court: Right now as we go along, as I pass each instruction.
>
> Mr. Richard Wait: Because, you see, I don't have the *Mathes* book and I have assumed that I should examine this and make a record of it at the end.
>
> The Court: You can come down here early in the morning and take a look at it.
>
> Mr. Richard Wait: I would be glad to do that." (T 385.)

Likewise, after the instructions had been actually given to the jury by the Court, the Court made the following inquiry:

"Are there further exceptions to the jury instructions?

Mr. Eugene Wait: No, Your Honor.

Mr. Richard Wait: No, Your Honor." (T 445.)

Obviously, counsel for Plaintiff had an opportunity to object to the Court's instructions, including the order of giving the instructions, at that moment. No objection was made and the Court had no opportunity to cure the "error" now relied upon by Appellant.

It is obvious that counsel for Plaintiff made no genuine attempt to enlighten the Court concerning the objections now presented to this Court. For example, during the settlement of instructions, counsel for Defendant offered an instruction to the effect that if there is negligence on the part of more than one driver, such negligence should not be compared. The following occurred:

"Mr. Eugene Wait: I haven't heard any instruction that covers that, that if there is negligence on the part of both they should not be compared.

The Court: I think that there is enough there about negligence and contributory negligence without this.

Mr. Richard Wait: We agree with that position.

The Court: I think this one would only be confusing.

Mr. Eugene Wait: I think it is a natural mistake of jurors to think, well, one was worse than the other one and we will say one was and the other was not.

Mr. Richard Wait: *The jury is adequately instructed by these instructions as to the meaning of contributory negligence.*

The Court: I think it would only be confusing." (T 389-390.) (Emphasis added.)

The cases relied upon by Appellant are not applicable to this case. In each instance, the language used in the questioned instructions was erroneous and required reversal. The fact that such erroneous language was repeated does not make these cases applicable to the instant case. In any event, there is no language in any of the instructions of the trial court to the jury in this case which is remotely similar to the instructions which required reversal in the cases cited.

Appellee respectfully submits that the Court's instructions taken as a whole were not erroneous in any respect and that Appellant's argument with respect to the instructions concerning contributory negligence is an attempt to make a semantic mountain out of a legalistic molehill. F.R.C.P. 61 indicates that such harmless error should be disregarded.

IV. A. THE TRIAL COURT DID NOT INSTRUCT THE JURY ON THE PRESUMPTION OF DUE CARE OF A PARTY. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE PRESUMPTION THAT THE LAW HAS BEEN OBEYED.

A careful reading of the instruction specified as error in Paragraph IV of Appellant's Brief shows that the Court did not instruct the jury that a party

is presumed to have exercised ordinary care or "due care". Accordingly, all of the cases cited by Appellant referring to instructions on the presumption of ordinary care have no application to this case.

Further, counsel for Plaintiff made no proper objection to the instruction now claimed to have been prejudicial error. The only "objection" by counsel for Plaintiff to this instruction appears in the Transcript at page 414. Counsel there states that "We think that the evidence has dispelled or eliminated any presumptions." This general objection did not advise the Court that counsel for Plaintiff was objecting to an instruction concerning a presumption of *ordinary care*. Accordingly, there was no way in which the Court could have anticipated this objection or could have corrected the error, if any. F.R.C.P. 51.

Further, counsel for Plaintiff stated that "the State of Nevada does not have the same laws as the State of California, and we think for the jury to be given that instruction is improper." (T 414.) This is not a correct statement. In fact, Nevada *does* have the same statute as the State of California. This statute is as follows:

> "N.R.S. 52.070 All other presumptions may be controverted. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by *other evidence*. The following are of that kind:
>
> 1. That a person is innocent of crime or wrong. . . .
>
> 15. That official duty has been regularly performed. . . .

20. That the ordinary course of business has been followed. . . .

28. That the thing happened according to the ordinary course of nature and the ordinary habits of life. . . .

33. That the law has been obeyed. . . ."
(Emphasis added.)

It is thus apparent from the express language of the Nevada statute that there were in existence at the time of this accident disputable presumptions in accordance with the Court's instructions. Accordingly, the instruction was not erroneous as claimed by Appellant.

The California cases relied upon by Appellant state in effect that a party may not rely upon the presumption of ordinary care where that party has testified concerning his conduct immediately prior to or at the time in question. These cases are not applicable to this case inasmuch as the Court did not instruct the jury concerning the presumption of ordinary care. In any event, these California cases are not applicable to the instant case inasmuch as the instruction actually given by the Court would benefit the Plaintiff to a greater extent than it would benefit the Defendant. In other words, the presumptions that a person is innocent of crime or wrong and that the law has been obeyed would apply to the Plaintiff who testified concerning her conduct immediately prior to or at the time in question. Likewise, these presumptions would benefit the Plaintiff by being equally applicable to the conduct of her husband, Francis

Cochran, who likewise testified concerning his conduct immediately prior to and at the time in question. Thus, the fact that these disputable presumptions could also apply to the Defendant does not sustain Appellant's argument that the instruction was prejudicial *to the Plaintiff*.

The Supreme Court of the State of Nevada has already ruled on the exact point in question. The Court held that an instruction concerning the presumption of ordinary care of the Plaintiff was not prejudicial error to the Defendant where the Plaintiff had testified fully concerning his conduct immediately prior to and at the time of the accident. In *Solen v. V. & T. R. R. Co.,* 13 Nev. 106 (1878), the Plaintiff testified fully concerning his conduct immediately prior to and at the time of the accident in which he was struck by the Defendant's train. In affirming the action of the trial court in refusing to grant a nonsuit and in affirming the verdict and judgment in favor of the Plaintiff, the Nevada Supreme Court stated as follows:

> "4. It is claimed that the court erred in instructing the jury as follows: 'In considering the question of reasonable care and prudence on the part of the plaintiff, William Solen, the jury have a right to take into consideration, together with the other facts of the case, the known and ordinary disposition of men to guard themselves against danger.' Instructions of this character are usually given only in cases where the facts fail to disclose the conduct of a deceased person. But we do not think appellant has any reasonable ground to complain of the language used.

It was one of the tests by which the plaintiff's proven conduct was to be measured. It being 'the known and ordinary disposition of men to guard themselves against danger,' such conduct would be presumed in the absence of proofs to the contrary. (citing cases) But when the facts are disclosed it is then the duty of the court and jury to determine whether plaintiff's conduct in the given case did show that he had used proper care to guard himself against danger. Viewing this instruction in the strongest possible light against the appellant, it could only be considered that in support of plaintiff's conduct, as proven, it was the duty of the jury to take into consideration the fact that plaintiff, as a reasonable man, would naturally guard against danger; that his testimony was, therefore, natural and reasonable; that he must have listened and looked whenever he could (as he testified he did), and that it would be unnatural to consider his testimony false because it accorded with the known and ordinary disposition of men.

The only way the jury had of determining whether the plaintiff used due care was to bring to their aid, in connection with the proven facts their own knowledge of the common sense and experience of mankind. (citing cases)." (13 Nev. at 152-153.)

It is obvious that the law of the State of Nevada clearly supports the instruction given by the trial court and that Appellant's claim of prejudicial error is unfounded.

In similar fashion, the United States Court of Appeals for the Ninth Circuit considered the preju-

dicial effect of an instruction on the presumption of due care in *Shanahan v. Southern Pacific Co.,* 188 F.2d 564 (9th Cir., 1951). The Plaintiff had objected to the giving of the instruction and in affirming the judgment on the verdict for the Defendant, this Court stated as follows:

> "We are unable to find any prejudicial error in the challenged instruction, or that it operated to deny appellant any substantial right. Fed. Rules Civ. Proc. rule 61, . . ." (188 F.2d at 567.)

IV. B. THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT A DISPUTABLE PRESUMPTION IS TO BE CONSIDERED AS EVIDENCE. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT A DISPUTABLE PRESUMPTION CONTINUES TO EXIST ONLY SO LONG AS IT IS NOT OVERCOME OR OUTWEIGHED BY EVIDENCE IN THE CASE TO THE CONTRARY.

N.R.S. 52.070 provides that disputable presumptions "are satisfactory, if uncontradicted" and that disputable presumptions "may be controverted by *other evidence*". (Emphasis added.) It is obvious that the Court's instruction conforms to the express language of the applicable Nevada statute and that this statute considers a disputable presumption to be a form of evidence. No other conclusion can be reached in view of the fact that the statute specifically provides that disputable presumptions may be controverted by *other evidence.*

The Nevada Supreme Court in *Solen v. V. & T. R. R. Co., supra,* expressly held that the presumption of ordinary care is a form of evidence which

would rebut the other direct evidence of Plaintiff's contributory negligence and prevent a non-suit. Accordingly, the claim of Appellant that this instruction was erroneous is patently incorrect.

As stated in 29 *Am. Jur.* 2d, Evidence, Section 165 at pages 201-203:

> "A rebuttable presumption of law is a rule of the substantive law declaring that for procedural purposes a certain prima facie probative force will and shall, until evidence sufficient to prove to the contrary is introduced, be provisionally attached to a given state of facts. The existence of such a presumption is generally held to impose on the party against whom it is invoked the duty to offer evidence as to the facts, and in the absence of such evidence, the trier of the facts is compelled to reach a conclusion in accordance with such presumption. Most courts take the view that such a presumption is not evidence, has no weight as such, and disappears completely from the case upon presentation of contravening evidence sufficient to amount to the degree of evidence required by the law to meet such presumption. The presumption serves a function in allocating or raising the burden of going forward with the evidence, but when that burden is met the existence or nonexistence of the assumed fact must be determined upon the evidence for and against its existence, with no assistance whatsoever from the presumption, because that element of the assumed fact has dropped from the case.
>
> Some other courts take the view, which appears to be gaining adherents, that a rebuttable

> presumption of law is itself evidence or has evidentiary value. In some states this view is predicated upon statutory provisions to that effect. Under this view, the presumption does not disappear the moment evidence contradicting it is received, but the presumption remains in the case to be considered by the jury as evidence; it disappears only when the facts upon which it is based have been clearly overcome by evidence to the contrary. Where evidence is of such conclusive character that only one reasonable deduction can be drawn therefrom, the presumption disappears."

It is obvious that the court's instruction objected to in Paragraph IV of Appellant's Brief correctly states the law applicable in the State of Nevada and that such instruction was not error, prejudicial or otherwise. F.R.C.P. 61; *Shanahan v. Southern Pacific Co., supra.*

V. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT A VIOLATION OF A RENO CITY ORDINANCE CREATED A PRESUMPTION OF NEGLIGENCE AS A MATTER OF LAW WHICH MIGHT BE OVERCOME BY EVIDENCE OF THE EXERCISE OF ORDINARY CARE.

F.R.C.P. 51 provides that no party may assign as error the giving of an instruction unless he objects thereto, stating *distinctly* the *matter* to which he objects and the *grounds* of his objection. Counsel for Plaintiff did not object to the Court's proposed instruction concerning the violation of the Reno City Ordinance upon the ground that the instruction

should be that a violation constitutes negligence as a matter of law. The sole ground for objection by the Plaintiff appears to be that there was not sufficient evidence to support a finding against the presumption of negligence in case there was a violation of the ordinance by the Defendant. (T 394.) Counsel for Plaintiff did not attempt to advise the Court that the proposed instruction was an incorrect statement of the law in the State of Nevada. Thus, the trial court was given no opportunity to consider whether or not the instruction correctly stated the law in the State of Nevada. Accordingly, Plaintiff may not now assign as error the giving of this instruction. F.R.C.P. 51.

Appellee respectfully suggests that the instruction given by the Court was a correct statement of the law. The instruction says no more than that a violation of law constitutes negligence as a matter of law in the absence of a *preponderance* of evidence that the driver exercised ordinary care under the circumstances. Thus, under the instruction, a finding of a violation of law compels a finding of negligence in the absence of a preponderance of evidence that the driver exercised ordinary care. This is the same thing as saying that an *unexcused* violation of law is negligence as a matter of law.

The law in this regard is stated in *Prosser on Torts,* Sec. 35 (3d Ed. 1964) at pages 202-203 as follows:

> "Once the statute is determined to be applicable—which is to say, once it is interpreted as

designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an *unexcused* violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature, and 'jurors have no dispensing power by which to relax it,' except in so far as the court may recognize the possibility of a valid *excuse* for disobedience of the law. This usually is expressed by saying that the *unexcused* violation is negligence 'per se,' or in itself. The effect of such a rule is to stamp the defendant's conduct as negligence, with all of the effects of common law negligence, but with no greater effect. There will still remain open such questions as the causal relation between the violation and the harm to the plaintiff, and, in the ordinary case, the defense of contributory negligence, and assumption of the risk."

* * *

"Two or three jurisdictions have arrived at what appears to be *precisely the same result* by holding that the violation creates a *presumption* of negligence, which may be rebutted by a showing of an adequate excuse but calls for a binding instruction in the absence of such evidence. A considerable minority have held that a violation is only evidence of negligence, which the jury may accept or reject as it sees fit. Some of the courts which follow the majority rule as to statutes have held that the breach of ordinances,

> or traffic laws, or the regulations of administrative bodies, even though the latter are authorized by statute, is only evidence for the jury. Such cases seem to indicate a considerable distrust of the arbitrary character of the provision, and a desire to leave some leeway for cases where its violation may not be necessarily unreasonable." (Emphasis added.)

The Nevada cases cited by Appellant merely hold that under the circumstances of those cases, it was not prejudicial error to instruct that a violation of the particular law in question was negligence *per se*. These cases did not hold that the instruction given by the Court in this case would be prejudicial error.

A review of the exceptions and objections of counsel for Plaintiff to this instruction, set out on Page 21 of Appellant's Opening Brief, clearly discloses that there was no suggestion by counsel for Plaintiff that this instruction was erroneous in that it authorized evidence of ordinary care to overcome a presumption of negligence as a matter of law from a violation of ordinance or statute. (T 394.) The only objection to this instruction was limited to the position that there was no evidence which could properly rebut a presumption of negligence arising from a violation of law by the Defendant. (T 394.) Thus, counsel for Plaintiff gave the trial court no opportunity to consider the particular language contained in the proposed instruction. For this reason, Appellant may not now assert as error the giving of this instruction. F.R.C.P. 51.

It is obvious that this instruction was of greater benefit to the Plaintiff than any possible benefit which could have accrued to the Defendant. A review of the facts in this case viewed most favorably to the Defendant, as set out in the Statement of Facts hereinabove, shows that the defense relied upon evidence of two violations of law by the driver of the Cochran vehicle. The first violation was the failure of the driver of the Cochran vehicle to yield the right of way to the Defendant. The second violation was speed in excess of the speed limit of 25 miles per hour and a violation of N.R.S. 484.060 known as the "basic speed law." This instruction authorized the jury to find against the presumption of negligence as a matter of law arising from these two violations of law by the driver of the Cochran automobile. Thus, on either or both of these two claimed violations of law, the Plaintiff was the potential beneficiary of a finding against the presumption by a further finding by the jury of a preponderance of evidence of exercise of ordinary care by the driver of the Cochran vehicle. The jury apparently did not reach a finding of ordinary care on the part of the driver of the Cochran vehicle. Inasmuch as the instruction was of greater potential benefit to the Plaintiff than to the Defendant, it cannot conceivably be considered prejudicial *to the Plaintiff*. F.R.C.P. 61.

As stated in *Prosser* hereinabove, the rules of law of the majority of jurisdictions and the minority of jurisdictions are essentially the same in essence in that each allows the finder of fact to avoid a con-

clusive finding of negligence in the event of a violation of law. The majority speaks in terms of an *unexcused* violation of law as being negligence as a matter of law and the minority speaks of a violation as creating a presumption of negligence as a matter of law. Inasmuch as there is no essential difference between the two positions, Appellee respectfully submits that Appellant has failed to show any error, prejudicial or otherwise, in the giving of this instruction. F.R.C.P. 61

Appellant further objects to the instruction concerning the "basic speed law" of Nevada Revised Statutes Section 484.060. This basic speed law provides as follows:

> ". . . It shall be unlawful for any person to drive or operate a vehicle of any kind or character . . . at a rate of speed greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway; or . . . at such a rate of speed as to endanger the life, limb or property of any person."

Appellant asserts that the Reno Municipal Ordinance, Section 10-111, establishing the *maximum* speed limit of 25 miles per hour "preempted" the basic speed law enacted by the Nevada State Legislature. Naturally, there is no case authority cited by Appellant for this position. It is obvious that a speed *less* than the established maximum speed limit can be unlawful under particular conditions of traffic, surface and width of the highway which might endanger the life, limb or property of any

person. Accordingly, *both* the ordinance and the State statute were applicable under the facts of this case and both were properly before the jury.

Appellant argues that the giving of this instruction concerning the basic speed law of the State of Nevada "enabled" Defendant's counsel to make an improper argument to the jury. Appellee answers this contention by pointing out that there was no such objection by Plaintiff to the instruction of the Court, no motion was made to forbid such an argument by counsel for the Defendant, and, in fact, no such argument was made by counsel for the Defendant. The reasoning of appellant in this regard is, to say the least, tortured.

Appellee respectfully submits that the instruction concerning the basic speed law of the State of Nevada was proper and was properly given by the Court to the trial jury.

VI. THE DEFENDANT PLEADED AND PROVED THE AFFIRMATIVE DEFENSE OF PASSENGER CONTRIBUTORY NEGLIGENCE.

Defendant raised the affirmative defense of the contributory negligence of the Plaintiff Lois Cochran in Paragraph II of the Defendant's Answer to the Complaint of the Plaintiff. This paragraph is as follows:

"II

Prior to and at the time of the collision referred to in the Complaint, *Plaintiff Lois Coch-*

ran and her husband Francis Cochran *negligently* drove, operated, entrusted, inspected, maintained and *used* said 1964 Plymouth automobile, *which said negligence* of *Plaintiff Lois Cochran* and Francis Cochran, her husband, *proximately contributed to the collision* between the 1964 Plymouth automobile and the 1953 Ford automobile operated by Defendant, and any and all injuries and/or damages, if any there were, resulting therefrom." (Tr. of Rec. 8; emphasis added.)

The evidence before the jury clearly established that there were no obstructions on the southwest corner of the intersection and that the view of each driver and the passenger, Plaintiff Lois Cochran, was equally clear. (T 24-25, 56, 91-92.) The Plaintiff was a passenger in the right front seat of a 1964 Plymouth Fury automobile operated by her husband Francis Cochran. (T 118-119.) The evidence established that the Cochran vehicle was exceeding the speed limit of 25 miles per hour. The Defendant Delizio testified that the Cochran vehicle was going "pretty fast, 60 is the number or better. It was pretty fast." This was corroborated by Helen Furry (T 211) and Ada Schaefer (T 309). In spite of this obvious misconduct and obvious violation of law by the driver Francis Cochran, the Plaintiff Lois Cochran made no objection or protest or warning of the obvious danger of such conduct. Further, although Plaintiff was looking down the street in an easterly direction and toward the direction in which the Defendant's vehicle was proceeding into the intersection, the Plaintiff did not see the Defendant

Delizio's vehicle until the Cochran vehicle was two-thirds of the distance through the intersection. (T 144.) This constituted substantial evidence that the Plaintiff herself had failed to exercise ordinary care as a passenger and warranted the submission of this issue to the jury.

Appellant remarks on the fact that counsel for Defendant did not even mention the subject of contributory negligence on the part of the Plaintiff herself in Defendant's closing argument. This "fact" is capable of supporting the following inferences:

1. The subject was too obvious to the jury to mention;
2. The absence of negligence on the part of the Defendant was a more important subject;
3. The negligence of the Plaintiff's husband Francis Cochran was so obvious that it was not necessary to mention the subject of Plaintiff's own contributory negligence;
4. Counsel for Defendant forgot to mention the subject.

Appellant argues that there was no *credible* evidence to support the giving of the instruction on contributory negligence on the part of the Plaintiff-passenger. This argument concerning the credibility of the witnesses was more properly presented to the trial jury. The jury determined the question of the credibility of the witnesses against the Plaintiff. Appellee respectfully submits that to argue the credibility of the witnesses to this Court is completely improper. There was substantial evidence by the

witnesses which, if *believed* by the jury, properly supports a finding of contributory negligence on the part of the Plaintiff Lois Cochran. Accordingly, the instruction was properly submitted to the trier of fact along with all questions concerning the credibility of the witnesses.

VII. THE ADMISSION OF EVIDENCE OF A PRIOR CLAIM BY THE WITNESS ADA SCHAEFER AGAINST PLAINTIFF AND HER HUSBAND DID NOT CONSTITUTE PREJUDICIAL ERROR.

The evidence to which objection is here made was given by the witness Ada Schaefer, a passenger in the right front seat of Defendant Mario Delizio's automobile, as follows:

> "Q. Okay. As a result of these injuries, did you make a claim against Mr. and Mrs. Cochran?
> A. Well, yes, there was a claim.
> Q. Is that claim presently pending?
> A. No, it's closed." (T 311.)

There was no evidence that the claim of Ada Schaefer was settled, that the claim of Ada Schaefer against Mr. and Mrs. Cochran was settled by the Cochran's insurance carrier, or that Plaintiff or her husband admitted negligence or legal responsibility for the accident. The fact that the claim was "closed" could mean that the claim had been abandoned by the claimant Ada Schaefer, that the claim had been denied and no further action on it taken, or that the claim had been submitted for decision before

some other court and decided adversely to the claimant Ada Schaefer. In any event, the evidence did affirmatively establish that there was no claim *presently* pending on behalf of the witness against the party against whom the witness was then testifying. If such a claim was presently pending, the jury could properly assume that the witness was biased or prejudiced against the Plaintiff and her husband. The fact that such a claim was not then pending was obviously relevant to rebut the suggestion of bias or prejudice on the part of the witness against the Plaintiff and her husband. Thus, the evidence was relevant and material to the issue of the credibility of the witness. Certainly no prejudice to the Plaintiff could have resulted from this innocuous bit of evidence relating to the credibility of the witness.

In *Schenker v. Bourne,* 102 N.Y.S.2d 928 (N.Y. 1951), the Court admitted evidence that the claims had been *settled.* There was no such evidence admitted in the instant case. Accordingly, this case is no authority whatever for a holding that the evidence admitted in this case was prejudicial or constituted reversible error.

Likewise, in *Ross v. Fishtine,* 227 Mass. 87, 177 N.E. 881 (1931), the offer of proof was that Plaintiff or someone in his behalf had *paid* certain sums of money to Defendant and the passengers in Defendant's car. If Defendant herein had offered testimony of the *payment* of money to Ada Schaefer by Plaintiff or someone on her behalf, the evidence would have been properly rejected. However, no such

evidence was offered by the Defendant and no such evidence was admitted by the Court. Accordingly, the *Ross* case is no authority whatever for Appellant's contention that the admission of this innocuous bit of evidence was prejudicial or constituted reversible error.

In *Meck v. Miller,* 1 F.R.D. 162 (D.Ct. Penn. 1940), the Court held that the affirmative defense of the Defendant was properly stricken. The settlement of the claims of the Defendant and his wife, an occupant of the automobile, against the Plaintiff by Plaintiff's indemnity insurance company was not relevant to the issues of negligence and contributory negligence. However, the Court in that decision did not consider the admissibility of such evidence on the issue of the credibility of a witness.

Likewise, the Court in *Meek v. Miller,* 38 F. Supp. 10 (D.Ct. Penn. 1941) was not concerned with the admissibility of such evidence on the issue of the credibility of a witness. The sole contention was that the evidence was admissible on the issues of negligence and contributory negligence. The Court properly decided that the evidence was not admissible on these issues. However, the holding of the Court is no authority whatever for the proposition that the admission into evidence of the testimony of the witness Ada Schaefer in this case was prejudicial or reversible error.

The California Appellate Court in *Zelayeta v. Pacific Greyhound Lines,* 104 C.A.2d 716, 232 P.2d 572 (1951) held that evidence of a settlement by a wit-

ness of a claim against a party was properly shown for the purpose of showing bias of the witness. The Court held that the jury ought to be instructed concerning the limited purpose of such evidence. Thus, the California Court held that such evidence is proper on the issue of the credibility of a witness but that the jury can properly be instructed concerning the limited purpose of the admission of such evidence. Here, Plaintiff did not request any instruction by the Court to the jury concerning the limited purpose for which the evidence was admitted, namely the credibility of the witness. Thus, Plaintiff is in no position to complain that the jury was not advised concerning the limited purpose for which such evidence was admitted.

Appellant's authorities concerning the admission of evidence of the settlement by way of compromise of a claim of a third person not a party to the suit are not applicable to the facts in this case inasmuch as there was no evidence here of any settlement or compromise.

Appellee respectfully submits that the evidence was properly admitted on the issue of the credibility of the witness Ada Schaefer, that Plaintiff could have and failed to request an instruction by the Court as to the limited purpose of such evidence, that such evidence was innocuous, made no reference to any settlement or compromise of the claim, and that if its admission could conceivably be considered as error, it was certainly not of sufficient substance to be considered prejudice or to constitute reversible error.

VIII. THE VERDICT AND JUDGMENT FOR THE DEFENDANT WERE PROPER AND SHOULD BE SUSTAINED.

Appellee respectfully submits that Appellant has raised but one claim of error which could have affected the substantial rights of the Plaintiff. This is the claim of Plaintiff that the trial court erred in instructing the jury that any negligence of Plaintiff's husband as driver of the car must be imputed to Plaintiff as an owner of the car under the provisions of N.R.S. 41.440. It is obvious that this instruction, if erroneous, would affect the substantial rights of the Plaintiff. However, Appellee submits that the clear language of N.R.S. 41.440 made it mandatory upon the trial court in the face of the uncontradicted evidence concerning the ownership of the vehicle to instruct that the negligence of the Plaintiff's husband was deemed the negligence of the Plaintiff if such negligence proximately contributed to the collision. As set out in Paragraph I of this brief, the Court's instruction in this regard was proper and in conformity with the law of the State of Nevada in force on the date of the accident. Accordingly, the Court's instruction was not error and cannot be the basis for a reversal of the verdict and judgment for the Defendant.

Appellee respectfully submits that all of the other claimed errors raised in Appellant's Opening Brief are within the provisions of F.R.C.P. 61 which directs that:

> "The court at every stage of the proceeding must disregard any error or defect in the pro-

ceeding which does not affect the substantial rights of the parties."

As stated in 7 *Moore's Federal Practice,* Section 61.11 at page 1030:

"Technically, Rule 61 is only a mandate to the district court, since the Supreme Court was only given authority to promulgate rules for the base line courts. But there is no doubt that the Court's views on harmless error, as expressed in the Rule, are gladly followed by the courts of appeals as expressive of the best practice."

The same authority makes the following statement:

"Judge Frank's comment that '. . . the doctrine of "harmless error" . . . to the chagrin of those devoted to a conception of litigation as a game of skill, has led to a marked reduction of reversals based upon procedural errors which can do no real harm' indicates that the courts of appeals recognize the sound judicial practice and common sense which Rule 61 enunciates." (7 *Moore's Federal Practice,* Section 61.11 at page 1031.)

28 U.S.C. § 2111 provides that:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The provisions of this section appear to be directed to the Courts of Appeals in the hearing of appeals from the District Courts. Appellee submits that the

specifications of errors II through VII of Appellant's Opening Brief do not affect the substantial rights of the Plaintiff and should be disregarded by this Court in the determination of this appeal from the judgment of the District Court entered on the verdict of the jury.

> "There can be no doubt that the integrity of verdicts, orders and judgments is the rule and the disturbance thereof is the exception. To entitle himself to relief from the verdict, order or judgment, a party must show that his case is within the exception. Error is not to be presumed but must be affirmatively shown." (7 *Moore's Federal Practice,* Section 61.11 at page 1032.)

Finally, it must be emphasized that in the present case, the record abundantly supports the Defendant's contentions that the driver of Plaintiff's automobile was negligent; that the clear language of the Nevada statute compelled the imputation of that negligence to the Plaintiff; that the Plaintiff herself was negligent; that the Defendant had the right of way and had properly proceeded into the intersection, at which point Plaintiff's husband drove a full one-half block into the intersection without seeing the Defendant; and that the instructions of the Court properly advised the jury concerning the issues to be resolved and the burden of proof with respect to the issues.

CONCLUSION

Appellee respectfully submits that the verdict and judgment for the Defendant were proper, that the instructions of the Court were not erroneous, and that the judgment of the District Court should be affirmed.

Dated, Reno, Nevada,
September 16, 1968.

Respectfully submitted,
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Attorneys for Appellee.